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**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON**

In re:

GIGA WATT, Inc., a Washington
corporation,

Debtor.

Case No. 18-03197 FPC 11

The Honorable Frederick P. Corbit

Chapter 7

MARK D. WALDRON, as Chapter 7
Trustee,

Plaintiff,

vs.

PERKINS COIE LLP, a Washington
limited liability partnership,
LOWELL NESS, an individual and
California resident, TIMUR
USMANOV, an individual and
Russian citizen,

Defendants.

Adv. Case No. 20-80031

**TRUSTEE'S REPLY TO
OBJECTION / OPPOSITION OF
"PERKINS GROUP" TO MOTION
TO DISMISS THIRD PARTY
COMPLAINT**

TRUSTEE'S REPLY TO OBJECTION /
OPPOSITION OF "PERKINS GROUP"
TO MOTION TO DISMISS THIRD-
PARTY COMPLAINT

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TRUSTEE’S REPLY TO OBJECTION /
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1 Mark D. Waldron, as the Chapter 7 Trustee herein, replies to Perkins'
2 opposition to the Trustee's motion to dismiss Perkins' Third-Party Complaint.
3 This reply is supported by the Declaration of Pamela M. Egan, filed herewith.

4 I. INTRODUCTION

5 In a baseball game, the managers make strategic decisions which have
6 consequences. And the rules are strict. A player who leaves the game in the third
7 inning cannot be brought back in the seventh.

8 Perkins chose neutrality during litigation which concluded with a final
9 Order staying Mr. Dam's claims to the GW ICO escrow and an interlocutory
10 Order enjoining his claims for damages under the consumer protection laws of
11 Washington. The time to reconsider these Orders has passed. Mr. Dam's appeals
12 of these Orders, which are fully briefed, prevent this Court from now changing
13 them. Perkins cannot call Mr. Dam back into the game.

14 Mr. Dam's joinder to assert his stayed claims is not required, because those
15 claims are void pursuant to the Automatic Stay Order. In addition, this proceeding
16 is not core. Decisions by this Court will be included in a Report and
17 Recommendations to the District Court. The District Court could wait for appeals
18 to run their course if Perkins made a case for that.

19 Further, the automatic stay binds the entire class of WTT holders regardless
20 of whether or not a class is formally certified or not, because the automatic stay is
21 self-executing. WTT holders cannot assert the stayed claims so long as the

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1 bankruptcy case remains open. The bankruptcy case will likely remain open until
2 the Trustee's claims are fully resolved. The Trustee's claims will be finally
3 resolved with Mr. Dam's claims in the District Court. Perkins can be accorded full
4 relief without duplicative liability by following the Automatic Stay Order and the
5 Preliminary Injunction Order.

6 Similarly, Mr. Dam's joinder to assert his enjoined claims is not required.
7 The Preliminary Injunction Order provides a specific, clear mechanism for
8 moving forward: the Bankruptcy Court would try the Trustee's case first and Mr.
9 Dam's case would be enjoined pending resolution of that case. The Preliminary
10 Injunction Order contemplates that the District Court will decide both the
11 Trustee's case and Mr. Dam's case together.

12 Therefore, there is no risk of duplicative damages and Perkins can be
13 accorded complete relief. Mr. Dam is not indispensable within the meaning of
14 Fed.R.Civ. 19.

15 Perkins argues that it is simply defending itself and therefore it is not
16 violating the Automatic Stay Order or the Preliminary Injunction. But Perkins is
17 joining Mr. Dam so that Mr. Dam can assert both the stayed and enjoined claims
18 in violation of both Orders.

19 Perkins claims that state law allows it to join Mr. Dam. However, the
20 Bankruptcy Code preempts state law. No state law, not even TEDRA, can
21 resurrect Mr. Dam's stayed claim or defeat the Bankruptcy Court's injunction.

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1 Perkins claims that the First Amended Complaint takes Mr. Dam's stayed
2 and enjoined claims out of the Automatic Stay and Preliminary Injunctions
3 Orders' purview. The First Amended Complaint does not change the basis for
4 these Orders, as Perkins' argues. The Court found that Mr. Dam's claims to the
5 GW ICO escrow were property of the estate. Therefore, those claims violated
6 section 362(a)(3) of the Bankruptcy Code. 11 U.S.C. § 362. The Court also found
7 that litigation of Mr. Dam's consumer protection claims should be decided after
8 this Court has issued its Report and Recommendation on the Trustee's claims. The
9 Trustee's decision to allege an attorney-client relationship and to amplify again
10 that the GW ICO escrow was a trust does not change the fact that Mr. Dam's
11 claims to the GW ICO escrow were void and that his consumer protection claims
12 should be temporarily enjoined while this Court manages and tries this case.

13 This notion of a sea change in the Trustee's trust claims is a ruse. The
14 Trustee has consistently asserted that the GW ICO escrow was a trust. The sea
15 change occurred in the nature of Perkins' duty to Giga Watt after the Trustee
16 discovered correspondence in which Perkins provided legal advice to Giga Watt
17 and told the United States Secret Service that it represented Giga Watt.

18 Perkins claims that the automatic stay does not bar claims brought against
19 the debtor in the bankruptcy court citing section 362(a)(1) of the Bankruptcy
20 Code. 11 U.S.C. § 362. However, the Court enforced section 362(a)(3) of the
21 Bankruptcy Code, which prohibits any party from bringing a claim in any forum if

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1 that claim belongs to the estate. *Id.* A party cannot usurp property of the estate in
2 any forum, particularly in the Bankruptcy Court which is charged with protecting
3 the property of the estate for the benefit of all creditors, not just the most
4 aggressive ones.

5 Therefore, the Trustee requests dismissal of the Third-Party Complaint with
6 prejudice.

7 II. BACKGROUND

8 Perkins and the Trustee extensively litigated the nature of the Trustee's
9 claims against it. Perkins claimed they were contract based. The Trustee claimed
10 they were trust based, arguing:

11 Invoking the Seventh Amendment, Perkins Coie would have the
12 Court squeeze the Trustee's claims into a boxed set of contract
13 claims, in which they do not fit, as if the Complaint were a
paradigmatic, if also completely defective, action at law. . . .

14 However, an escrow, which forms the basis of the Complaint, is in
15 actuality "an account held on trust." Escrow, Black's Law Dictionary
16 (11th ed. 2019). . . . *Lechner v. Halling*, 216 P.2d 179, 35 Wash. 2d
17 903, 912 (Wash. 1950) ("An escrow is a trust, Restatement (Second)
of Trusts s 32, Comment d 1959."). Perkins does not deny that it
held the money in trust. It only denies that it held the money in trust
for Giga Watt [footnote citation to PC's Ans. and Aff. Defs., ECF
No. 28, 5:10-12].

18 *Memorandum of Points and Authorities in Support of Plaintiff's Motion to Strike*
19 *Jury Demand*, dated February 5, 2021, ECF No. 37 at 3:18-20, 4: 1-18, 5:1-2.

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1 Deciding the contract versus trust dispute, the Court held:

2 This Court declines the invitation to recast the Trustee's breach of
3 fiduciary duty claims as breach of contract claims. . . . [T]he Trustee
4 claims the defendants breached, or aided a breach, of a fiduciary
duty, based on facts and circumstances yet to be proven, related to an
agreement by certain Defendants to hold money in trust.

5 *Order Striking Jury Demand*, April 22, 2021, ECF No. 49 at 9.

6 On May 6, 2021, Perkins appealed this order. *Perkins Coie LLP v. Waldron*,
7 Case No. 2:21-cv-00159-SAB. The District Court dismissed it as interlocutory
8 after censuring Perkins for misrepresenting the applicable law. *Order Denying*
9 *Motions and Appeals*, January 7, 2022, ECF No. 21.

10 On June 18, 2021, the Trustee moved for contempt against Jun Dam
11 alleging that his claims against Perkins were property of the estate and should be
12 barred. On October 29, 2021, the Trustee commenced an adversary proceeding to
13 enjoin Mr. Dam's claims brought under the consumer protection acts. Adv. Proc.
14 No. 21-80053.

15 As a registered participant in the Court's electronic filing system, Perkins
16 received instantaneous notice of the automatic stay litigation. And Perkins will no
17 doubt agree that the Trustee kept Perkins timely apprised of filings and events in
18 that litigation. Perkins' counsel attended hearings in the preliminary injunction
19 litigation. *See e.g., Waldron v. Dam*, Case No. 21-80053, ECF Nos. 35 and 71.

20 Perkins did not object to either the Automatic Stay Order or the Preliminary
21 Injunction Order.

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1 The Automatic Stay Order and Preliminary Injunction are currently on
2 appeal before the District Court on a consolidated basis. *Dam v. Waldron*, Case
3 Nos. 2:21-cv-00291-SAB, ECF No. 19. The appeals are stayed pending the
4 mediation which is set for January 20, 2023.

5 In the Automatic Stay Order and Preliminary Injunction Order, the Court
6 found that Mr. Dam's claims fit within two sets. One set asserted various
7 contractual interests in the GW ICO escrow, alleging that the money in the escrow
8 belonged to the WTT holders. The other set asserted the right to compensatory
9 damages under state consumer protection laws alleging that Perkins engaged in
10 conduct that was capable of deceiving the public, namely allowing the public to be
11 told one thing (that Perkins would hold the WTT investment proceeds until Giga
12 Watt met construction milestones) but doing another (releasing sparsely accounted
13 for funds whenever Andrey Kuzenny asked for them).

14 The Court found that Mr. Dam's first set of claims, alleging an interest in
15 the escrow, belonged to the estate and that therefore (1) he lacked standing to
16 bring them and (2) they were void.

17 The Court distinguished Mr. Dam's second set of claims. By alleging that
18 Perkins engaged in conduct that had the capacity to deceive the public, Mr. Dam
19 was alleging direct damages. The Court held that these claims belonged to Mr.

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1 Dam. However, the Court enjoined these claims for the reasons set forth in the
2 Preliminary Injunction Order holding:

3 [A]fter adjudicating the Trustee's Lawsuit, this Court will submit
4 proposed findings of facts and conclusions of law to the District
5 Court. The District Court will have the benefit of the Bankruptcy
6 Court's proposed findings and conclusion at the time it finally
7 resolves both the Trustee's Lawsuit and Mr. Dam's Lawsuits. Under
these circumstances, the issuance of the preliminary injunction
staying Mr. Dam's Lawsuit promotes the efficient and expeditious
resolution of all matters connected to the bankruptcy estate.

8 *Preliminary Injunction Order*, Adv. Proc. No. 21-80053-FPC, ECF No. 39 at 3.

9 The Orders set a road map for this litigation. The parties should have to follow it.

10 **III. ARGUMENT**

11 **A. Mr. Dam is not a required party**

12 Mr. Dam's stayed claims are void. Therefore, he has no claim to resolve
13 with respect to the GW ICO escrow.

14 Perkins expresses concern that the Automatic Stay Order will be overturned
15 on appeal in which case it will face additional liability later. However, because
16 this proceeding is not core, the Court will file a Report and Recommendation for
17 the District Court. And it will have the benefit of that Report and
18 Recommendation when it reviews Mr. Dam's case. A stay pending appeal could
19 be filed. There is neither a need nor a way to violate the Automatic Stay Order.

20 Perkins also expresses concern that other WTT holders will argue that the
21 Automatic Stay Order does not bind them. This argument is a fallacy. The

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1 automatic stay applies worldwide without the need for a specific order. It enjoins
2 “any act to obtain possession of property of the estate or of property from the
3 estate or to exercise control over property of the estate.” 11 U.S.C. § 362 (a)(3).

4 “The automatic stay is self-executing, effective upon the filing of the bankruptcy
5 petition.” *Gruntz v. Cnty. of Los Angeles*, 202 F.3d 1074, 1081 (9th Cir. 2000).

6 The Automatic Stay Order did not impose the stay. It recognized the stay.

7 Further, the District Court will have the ability to resolved Mr. Dam’s
8 enjoined claims along with this Court’s Report and Recommendation pursuant to
9 the Preliminary Injunction Order’s express terms. Therefore, complete relief will
10 be accorded to Perkins and no risk of duplicative liability exists.

11 **B. Perkins cannot collaterally attack the Automatic Stay Order and the**
12 **Preliminary Injunction Order**

13 Now that the Orders have been entered and are on appeal, Perkins must
14 comply with them and cannot collaterally attack them. *See* Black’s Law
15 Dictionary, 10th Ed. 2014 (defining “collateral attack” as “[a]n attack on a
16 judgment in a proceeding other than a direct appeal”). *See also In re Grantham*
17 *Bros.*, 922 F.2d 1438, 1442 (9th Cir. 1991) (“The failure of the debtors to seek any
18 review, reconsideration, or stay of the bankruptcy court's order precluded the
19 collateral attack included in [a subsequent] complaint.”).

20 Furthermore, the Court cannot modify these Orders to change the *status quo*
21 and bring Jun Dam into this adversary proceeding without violating the

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1 divestment rule, because it would require this Court to consider the same issues –
2 whether the automatic stay applies and the preliminary injunction is appropriate –
3 that are currently before the District Court on appeal. *See Kern Oil & Refining Co.*
4 *v. Tenneco Oil Co.*, 840 F.2d 730, 734 (9th Cir.1988) (describing the divestment
5 rule as a “judge-made doctrine designed to avoid the confusion and waste of time
6 that might flow from putting the same issues before two courts at the same
7 time.”).

8 **C. The automatic stay does not wax and wane with the Trustee’s pleadings**

9 Basically, Perkins argues that the Court should withdraw two Orders that
10 are on appeal before the District Court, because Perkins did not realize that the
11 Trustee was asserting a trust until after the Orders were entered. The chronology
12 disputes this narrative, as set forth above. It also focuses on the wrong set of
13 pleadings. The automatic stay analysis under section 362(a)(3) focuses on whether
14 Mr. Dam’s claims were property of the estate, not on the Trustee’s complaint. 11
15 U.S.C. § 362. Indeed, the Trustee could have filed no pleadings and the claims
16 asserted by Mr. Dam to the GW ICO escrow would have still belonged to the
17 estate, so long as the Trustee had not abandoned them.

18 Also, the “paradigmatic shift” in the Trustee’s pleadings did not turn on
19 whether the GW ICO escrow was a trust. The Trustee has consistently alleged and
20 argued (successfully) that it was a trust. The shift turned on the Trustee’s
21 understanding of the relationship between Giga Watt and Perkins Coie. The

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1 Trustee had thought, based on Perkins' statements and non-disclosures, that
2 Perkins was not Giga Watt's attorney. When the Trustee discovered the emails
3 between Perkins and Giga Watt, the nature of the Giga Watt-Perkins relationship
4 changed dramatically.

5 The attorney-client relationship is important. It triggers rigorous duties of
6 loyalty and high standards of competence. It strengthened the Trustee's claim that
7 Perkins owed Giga Watt a fiduciary duty.

8 **D. Joinder is not purely defensive and, thus, it is stayed and enjoined**

9 Joinder intends to allow Mr. Dam to assert his stayed claims, which would
10 constitute an act "to obtain possession of property" or "to exercise control over
11 property of the estate" in violation of section 362(a)(3) of the Bankruptcy Code.
12 11 U.S.C. § 362. *See* Automatic Stay Order at 23, ECF No. 921:

13 While the automatic stay specifically enjoins eight acts, one
14 subsection is at issue here: 11 U.S.C. § 362(a)(3), which provides that
15 the stay applies to "any act to obtain possession of property of the
16 estate or of property from the estate or to exercise control over
17 property of the estate" In this case, the Court determines that the
18 first three causes of action alleged in the Class Complaint are claims
that the Class has no standing to assert and are property of the estate.
Because these causes of action are estate property, the automatic stay
applies to them and **thus Mr. Dam and the proposed class must not
pursue Class Complaint Counts I, II, and III.**

19 Automatic Stay Order at 23-24, ECF No. 921. (Emphasis added.) Thus, joining
20 Mr. Dam to resolve his and the proposed class claims to the escrow violates the
21 Automatic Stay Order.

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1 The Preliminary Injunction Order intended to protect the Trustee from the
2 burden and distraction of Mr. Dam's consumer practices act claims.

3 The pursuit of Mr. Dam's Lawsuit during the pendency of the
4 Trustee's Lawsuit threatens the jurisdiction of this Court, the
5 integrity of the bankruptcy process, and the orderly liquidation of the
6 bankruptcy estate.

7 Preliminary Injunction Order, Adv. Proc. No. 21-80053, ECF No. 39 at 31. The
8 Court contemplated that it would present its Report and Recommendation to the
9 District Court, which would then decide both the Trustee's claims to the GW ICO
10 escrow and Mr. Dam's claims for compensatory damages under the consumer
11 practices laws of Washington. If a stay pending an appeal to the Court of Appeals
12 is warranted, the parties could request one. Joining Mr. Dam so that he can assert
13 the enjoined claims in this Court simultaneously with the Trustee's claims violates
14 the Preliminary Injunction Order.

15 **E. No state law, even TEDRA, entitles Perkins to ignore orders of this**
16 **Court**

17 The Supremacy Clause provides that the "Constitution and the Laws of the
18 United States which shall be made in Pursuance thereof ... shall be the supreme
19 Law of the Land ... any Thing in the Constitution or Laws of any State to the
20 Contrary notwithstanding." U.S. Const. art. VI, cl. 2. The Supremacy Clause and
21 the doctrine of preemption, which implements it, operate to invalidate state
22 statutes to the extent they are inconsistent with, or contrary to, the purposes or

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1 objectives of federal law. *Perez v. Campbell*, 402 U.S. 637, 652, 91 S.Ct. 1704, 29
2 L.Ed.2d 233 (1971) (“[A]ny state legislation which frustrates the full effectiveness
3 of federal law is rendered invalid by the Supremacy Clause.”). This Court has
4 applied section 362 and 105 of the Bankruptcy Code to manage this litigation over
5 which it has “related to” jurisdiction. 11 U.S.C. § 362; 11 U.S.C. § 105; 28 U.S.C.
6 § 157(a). TEDRA does not offer an exit from this Court’s Orders.

7 **F. Perkins incorrectly hinges its analysis on 362(a)(1) of the Bankruptcy**
8 **Code; section 362(a)(3) is the operative provision**

9 Perkins argues that section 362(a)(1) of the Bankruptcy Code only stays (1)
10 claims against the debtor (2) that are made outside of the bankruptcy court. The
11 Automatic Stay Order does not rest on section 362(a)(1). It rests on section
12 362(a)(3) which provides that no one (except for the Trustee) can exercise control
13 over property of the estate. 11 U.S.C. § 362. Automatic Stay Order, ECF No. 921
14 at 23-24. This prohibition applies to any act to exercise control over property of
15 the estate in any forum. Therefore, joining Mr. Dam so that he can assert the
16 stayed claims violated the automatic stay and is, therefore, void.

17 **G. The Preliminary Injunction Order bars the Third-Party Complaint**

18 Mr. Dam’s enjoined claims are different than his stayed claims. His
19 enjoined claims seek compensable damages caused by Perkins’ conduct which
20 allegedly was capable of deceiving the public. Specifically, Mr. Dam alleges that
21 Perkins allowed the public to be told one thing (money would be released to Giga

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1 Watt in step with construction) but did another (money was released when Andrey
2 Kuzenny asked for it). The Court held that these alleged compensatory damages
3 flowed directly to Mr. Dam.

4 Perkins argues that the Preliminary Injunction only enjoined litigation in the
5 District Court, leaving Mr. Dam free to pursue these claims in other fora,
6 presumably, even state court. This is not a fair reading of the Preliminary
7 Injunction Order, which intended to prepare its findings and conclusions for the
8 District Court before Mr. Dam's case is resolved. Changing these terms by joining
9 Mr. Dam violated the Preliminary Injunction Order.

10 IV. CONCLUSION

11 This litigation has evolved over the course of two years. We are in the third
12 year. Each side has made decisions about how to proceed. The Court has issued
13 Orders based on the parties' motions, objections, and arguments. Perkins assented
14 to the Automatic Stay Order and Preliminary Injunction Order, which are now on
15 appeal and cannot be rescinded. Just as in baseball where managers cannot undo
16 in the seventh inning a decision made in the third, neither the parties nor this
17 Court can undo the Automatic Stay Order and Preliminary Injunction Order.

18 At the end of the case, when judgment is entered, the parties can appeal and
19 bring their various disputes. But while the case is still pending here, the Court's
20 decisions have to stand in order for the case to progress.

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1 WHEREFORE, the Trustee requests an Order dismissing the Third-Party
2 Complaint and granting such other and further relief as the Court deems
3 appropriate and just.

4 Dated: January 10, 2023 POTOMAC LAW GROUP PLLC

5
6 By: s/ Pamela M. Egan
7 Pamela M. Egan (WSBA No. 54736)
8 *Attorneys for Mark D. Waldron, Chapter 7*
9 *Trustee, Plaintiff*
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